In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1317

THE LAIDLAW CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In July 1969, the court of appeals sustained the Board's finding that petitioner had violated the National Labor Relations Act by, *inter alia*, terminating striking employees and refusing to reinstate them after they made unconditional offers to return to work. The court entered a decree which directed petitioner to reinstate the striking employees, and to make them whole for any loss of earnings suffered as a result of petitioner's discrimination against them.[1]

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[1] *The Laidlaw Corp.* v. *National Labor Relations Board*, 414 F.2d 99 (C.A. 7), certiorari denied, 397 U.S. 920, enforcing 171 NLRB 1366.

In November 1972, after attempts to agree upon the amount of backpay owed to discriminatees proved unsuccessful, the Board issued a specification setting forth the backpay claims for 48 discriminatees. In November 1973, after a hearing, the Board determined that the discriminatees were owed backpay of $99,621.67, with interest at the rate of six percent (Pet. App. 8-74). On December 12, 1974, the court of appeals sustained the Board's decision and enforced the Board's backpay order in full (Pet. App. 1-7).

2. Petitioner's primary contention is that the Board failed to consider whether each discriminatee "lowered his sights" and sought lower paying interim employment during the backpay period (Pet. 6-11).

It is well settled, however, that willful loss of earnings is an affirmative defense which the employer has the burden of proving. See, *e.g.*, *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8); *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 812-813 (C.A. 5); *Golay & Co.* v. *National Labor Relations Board*, 447 F.2d 290, 295 (C.A. 7), certiorari denied, 404 U.S. 1058. To meet that burden, the employer must establish that each discriminatee "neglected to make reasonable efforts to find interim work." *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (C.A. 5). Contrary to its contention (Pet. 6), petitioner did not introduce "extensive evidence concerning the length and scope of employee searches and the availability of suitable employment opportunities in other fields." The administrative law judge found that, except for some newspaper advertisements (sometimes illegible) covering a part of the backpay period and a letter from state authorities concerning the relative level of unemployment in the vicinity, petitioner introduced no evidence that any suitable job was available to a discriminatee

or that any discriminatee willfully failed to accept such employment (Pet. App. 21-24). Moreover, the judge found that almost without exception the discriminatees registered with the state employment security division, and no discriminatee was offered any employment (Pet. App. 23). In these circumstances, the court of appeals properly sustained the Board's finding that each discriminatee had made a reasonable search for employment and did not willfully incur loss of earnings (Pet. App. 4-5, 8-9, 24-62).

No conflict exists among the circuits on this issue. *National Labor Relations Board* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1319-1321 (C.A. D.C.), *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 242 F.2d 697 (C.A. 6), certiorari denied, 355 U.S. 821, and *National Labor Relations Board* v. *Moss Planning Mill Co.*, 224 F.2d 702 (C.A. 4), upon which petitioner relies, are inapposite, since in those cases, unlike the instant case, the employer had sustained his burden of showing that there were "suitable" but lower paying jobs available.

3. Petitioner also contends (Pet. 11-14) that the court of appeals erred in sustaining the Board's finding that strike benefits were not earnings. As the Board and court below found, however, any assistance from the union during the strike in the form of strike benefits was computed on a formula based on need and family situation and ranged from $20 to $30 per week, plus $2 per child (Pet. App. 17-19). Thus the amount received was unrelated to the number of hours spent by the striker on the picket line, nor was a striker "docked" if he missed a picketing assignment by reason of illness or job searches. The strike benefit payment were disbursed only to unemployed strikers (*ibid.*). In these circumstances, the Board and the court below properly concluded that the sums received were collateral benefits flowing from the association of the discriminatees

with their union, rather than earnings from interim employment (Pet. App. 4, 12). The Board's decision is therefore fully in accord with *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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PETER G. NASH,
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JUNE 1975.